



राजपत्र, हिमाचल प्रदेश (असाधारण)

हिमाचल प्रदेश राज्य शासन द्वारा प्रकाशित

शिमला, सोमवार, 26 जुलाई, 2004/4 भावण, 1926

हिमाचल प्रदेश सरकार

निर्वाचन विभाग

अधिसूचना

शिमला-9 19 जुलाई, 2004

संख्या 3-16/2002-ई0एल0एन0.—भारत निर्वाचन आयोग की अधिसूचना संख्या 82/हि0प्र0-वि0स0/ (5-2003)/2004, दिनांक 24 जून, 2004 तदनुसार 3 आषाढ़, 1926 (शक), जिसमें 23-गेहड़वीं विधान सभा निर्वाचन क्षेत्र से विधान सभा निर्वाचन-2003 को प्रश्नगत करने सम्बन्धी निर्वाचन अर्जी संख्या-5 शीर्षक "श्री रिखी राम कौण्डल बनाम श्रीमती रूप सनी एवं अन्य" में हिमाचल प्रदेश उच्च न्यायालय स्थित शिमला, के तारीख 28 अप्रैल, 2004 का निर्णय निहित है, को जनसाधारण की सूचना हेतु प्रकाशित किया जाता है।

आदेश से,

मनीषा नन्दा,
मुख्य निर्वाचन अधिकारी,
हिमाचल प्रदेश।

भारत निर्वाचन आयोग

24 जून, 2004

तारीख : _____

3 आषाढ़, 1926 (शक)

अधिसूचना

सं० 82/हि०प्र०/(5-2003)/2004.—लोक प्रतिनिधित्व अधिनियम, 1951 (1951 का 43) की धारा 106 के अनुसरण में निर्वाचन आयोग 2003 की निर्वाचन अर्जी संख्या 5 में शिमला स्थित हिमाचल प्रदेश उच्च न्यायालय के तारीख 28 अप्रैल 2004 के निर्णय को एतद्वारा प्रकाशित करता है।

ELECTION COMMISSION OF INDIA

Nirvachan Sadan,
Ashoka Road,
New Delhi-110001.

24th June, 2004

Dated: _____

3 Asadha 1926 (SAKA)

NOTIFICATION

No.82 HP-LA/(5-03)/2004.—In pursuance of Section 106 of the Representation of People Act, 1951 (43 of 1951), the Election Commission hereby publishes judgement dated 28th April, 2004 of the High Court of Himachal Pradesh at Shimla in Election Petition No. 5 of 2003.

THE HIGH COURT OF HIMACHAL PRADESH SHIMLA

Election Petition No. 5 of 2003 and KMP No. 7 of 2004

Judgement reserved on : 23-4-2004

Date of Decision : April 28, 2004

Rikhi Ram Kaundal

..Petitioner.

Versus

Smt. Roop Rani & Ors.

..Respondents

Coram

The Hon'ble Mr. Justice R. L. Khurana, Judge.
The Hon'ble Mr. Justice

Whether approved for reporting : No,

For the Petitioner : M/s. K. D. Sood, Sandeep Kaushik & Dalip Sharma, Advocates.

For the respondents : Mr. Rakesh Jaswal, Advocate, for respondent No. 1.

Mr. S. C. Kapoor, Sr. Advocate with Mr. N. S. Chandel, Advocate
for respondent No. 2.

Whether reporters of Local Papers may be allowed to see the Judgement—Yes.

R. L. KHURANA, JUDGE

The petitioner by virtue of the present petition preferred under Sections 80/81 read with Section 100/101 of the Representation of the People Act, 1951 (for short : the Act) has called in question the election of respondent No. 2, Shri Beeru Ram, the returned candidate from 23-Gherwin Legislative Constituency of Himachal Pradesh Vidhan Sabha.

The constituency is reserved for Scheduled Caste candidate. The petitioner contested the elections from this Constituency as a candidate of Bhartiya Janta Party while respondent No. 1 Smt. Roop Rani contested as a candidate of Indian National Congress. Respondent No. 3 Rajesh Kumar was a candidate of Lok Jan Shakti Party and the remaining two respondents, that is, respondents No. 2 and 4 were the Independent candidates. Polling took place on 26-2-2003 and the counting of votes was held on 1-3-2003. Respondent No. 2 (who secured a total of 21,512 votes as against the total votes of 19,958 secured by the petitioner), was declared elected by a margin of 1554 votes.

The case of the petitioner, briefly stated, is that respondent No. 1 Smt. Roop Rani did not belong to Scheduled Caste and her nomination was wrongly accepted by the Returning Officer and that such wrong acceptance of her nomination has materially affected the result of elections. The petitioner has, therefore, prayed that election of respondent No. 2 be set aside and he be declared elected for 23-Gherwin Constituency on the basis of the votes polled by him.

Respondent No. 3 and 4 did not put in appearance before this Court in spite of having been duly served. They were, accordingly, ordered to be proceeded against *ex-parte*.

The petition is, thus, being resisted and contested by respondents No. 1 and 2. Both these respondents, though have filed separate written statements, have taken a common stand to the effect that respondent No. 1 belongs to Scheduled Caste and that her nomination was rightly accepted on the basis of the caste certificate issued in her favour by the competent authority. Preliminary objections were also raised to the effect that the petition lacks material facts and particulars and does not disclose any cause of action, the copy of the petition supplied to the respondents is not the true copy and that the petition has not been verified as per law.

On the pleadings of the parties, following issues were framed on 5-9-2003 :—

1. Whether the election petition lacks material facts and particulars and does not disclose any cause and as such is liable to be dismissed ? OPR.
2. Whether the petition supplied by the petitioner is not true copy of the petition filed before this Honble Court ? OPR.
3. Whether the pleadings have not been verified as per the provisions of Code of Civil Procedure and non compliance of Order 6 Rule 15 sub rule (4), Code of Civil Procedure and Section 87 of the Representation of People Act ? OPR.
4. Whether the respondent No. 1 was not qualified to contest elections from Gherwin (SC Constituency) she being not a Scheduled Caste and her nomination has been wrongly accepted ? OPP.
5. Whether the presence of respondent No. 1 in the election fray from Gherwin S. C Constituency has materially affected the result of the election, as alleged ? OPP.

6. Whether the petitioner is entitled to be declared elected to the H. P. Vidhan Sabha from Gherwin Constituency? OPP.

7. Relief.

Both the parties have led oral as well as documentary evidence in support of their respective claims.

I have heard the learned counsel for the parties and have also gone through the record of the case. My findings on the above issues are as under :—

Issue No. 4 :

The petitioner in para 6 of his petition has averred as under :—

“That the respondent No. 1 Smt. Roop Rani filed Nomination papers for the above mentioned Constituency as a Scheduled Caste candidate which is totally against the factual position on record. Factually respondent No. 1. Roop Rani does not belong to the Scheduled Caste category and is a TARKHAN BODE which is not a Schedule Caste. The Executive Magistrate (Naib-Tehsildar) Jhandutta, Distt. Bilaspur, H. P. on 7-2-2003 issued notice to the respondent No. 1 Smt. Roop Rani stating therein that the schedule caste certificate bearing Sr. No. 521 dated 5-2-2003 issued to her on the basis of the report of the Patwari Halqua Sunhali was issued inadvertently on the basis of the caste of the husband/in-laws whereas as per the instructions of the State Government a Schedule Caste/Schedule Tribe Certificate is required to be issued on the basis of parentage of the applicant concerned. It was specified in the notice and it was directed that the respondent No. 1 not to produce the said certificate at any forum or to get any benefit from the said certificate and it was further stated that separate proceedings are being initiating to get the said certificate cancelled by the Competent Authority. The respondent No. 1 received the said notice on 7-2-2003 itself as is evident from her signatures on notice which is annexed as ANNEXURE P-2 with the petition. It is submitted here that the respondent No. 1 on 7-2-2003 had knowledge to the effect that her certificate of schedule caste has been inadvertently issued and that the respondent No. 1 had knowledge that she did not belong to the S. C. category. It is pertinent to mention here that as per the election programme the last date of filing nomination papers for the Assembly elections was 7-2-2003, scrutiny was to be done on 8-2-2003 and the last date of withdrawal was 10-2-2003. The petitioner humbly submits that at that relevant time the petitioner had no knowledge regarding issuance of ANNEXURE P-2 but thereafter on coming to know this above fact obtained a copy of the same on 18-3-2003.”

A bare perusal of the above averments shows that it is the admitted case of the petitioner himself that a certificate declaring respondent No. 1 Smt. Roop Rani to be belonging to Schedule Caste was issued by the Competent Authority and such certificate was duly annexed with the nomination papers. The Returning Officer accepted the nomination of respondent No. 1 on the basis of such certificate.

Evidence has been led to show that the Competent Authority issuing the certificate vide notice dated 7-2-2003 had directed respondent No. 1 not to produce the said certificate before any forum and to take benefit thereunder, since the certificate was inadvertently issued based on the caste of her husband/in-laws. Admittedly the certificate alleged to have been issued on 5-2-2003 has not been withdrawn/cancelled by the authorities till date. The notice dated 7-2-2003 is alleged to have been served upon and received by respondent No. 1 on the same day. A copy of the notice is further alleged to have been delivered in the office of the Returning Officer on 8-2-2003.

It is significant to note that the notice purported to have been issued on 7-2-2003 to respondent No. 1 and received by her on the same day has not been proved in evidence. PW 1 Munshi Ram, who is alleged to have issued the notice, though had brought the record, no attempt has been made by the petitioner to prove on record a copy of such notice. Even the person, who is alleged to have served the notice on the respondent No. 1 has not been examined. PW 2, the Returning Officer, has categorically stated that no notice dated 7-2-2003 alleged to have been issued by PW 1 to respondent No. 1 was available on the record.

Had a notice been issued, as claimed by the petitioner, by PW 1 to respondent No. 1 and a copy thereof endorsed to the Returning Officer, the same must have been available on the record of the Returning Officer.

Admittedly, the certificate, copy of which is Ex. R1/A, issued by PW 1 has not been cancelled and/or withdrawn till date. Mere issuance of notice by PW 1 (assuming such a notice was in fact issued) calling upon respondent No. 1 not to produce the certificate before any forum and not to derive any benefit thereunder would not *ipso facto* mean that respondent No. 1 does not belong to Schedule caste.

As per the case set up by the petitioner, respondent No. 1 was born to parents belonging to Tarkhan (Bode) community which is not a Scheduled Caste community in the State of Himachal Pradesh and that though she might have married a person belonging to Schedule Caste, she would not acquire the status of Schedule Caste on account of marriage since the question whether a person belongs to Schedule caste or not is to be determined on the basis of parentage.

Though in the pleadings the petitioner has averred that the respondent No. 1 is not a Schedule Caste since she was born to parents belonging to Tarkhan (Bode) community which is not recognized as Scheduled Caste in the State, while appearing as PW 4, the petitioner during the course of cross-examination has admitted as under :

"To my information Sita Ram belongs to Lohar Community. It is correct that in the state of H. P. Lohar belong to Scheduled Caste community."

Admittedly, Sita Ram above named is the father of respondent No. 1. If, as per the petitioner's own case, the father of respondent No. 1 was a Scheduled Caste, it cannot be said that respondent No. 1 is not Scheduled Caste.

During the course of hearing, an application being EMP No. 7 of 2004 came to be made by the petitioner to the effect that there has been a typing mistake while recording the statement petitioner as PW 4 inasmuch as instead of "Sant Ram" (the husband of respondent No. 1) the name has been wrongly typed as "Sita Ram" (the father of respondent No. 1). It was, therefore, prayed that the typing error be corrected.

There is no merit in the application. A bare reading of cross-examination of the petitioner as PW4 by respondent No. 1 shows that separate questions were put to the petitioner with regard to the caste of the husband and the father of respondent No. 1. In so far as the question with regard to the caste of the husband of respondent No. 1 is concerned, the petitioner pleaded ignorance. However, when asked about the caste of Sita Ram, the father of respondent No. 1, the petitioner stated that to his information Sita Ram belongs to Lohar community.

Secondly, it is pertinent to note that on an earlier occasion also an application being EMP No. 1/2004, was made by the petitioner for corrections of the typing mistakes appearing in his statement. Such application was allowed on 1-3-2004 and necessary corrections carried out in the statement of the petitioner. In such application no grievance was made by the petitioner as to typing error in the name as 'Sita Ram' instead of 'Sant Ram'.

It appears that the present application has been made just to resile from and get out of the admission of a fact already made. Hence the application, EMP No. 7/2004 is dismissed.

Much reliance was placed by the learned counsel for the petitioner on the evidence of PW3, Shri Surinder Kaundal, Tehsildar Badsar to show that parents of respondent No. 1 belongs to Tarkhan (Bode) community which is not a Scheduled Caste community in the State.

No. reliance can be placed on the evidence of PW3. The primary evidence, that is, the pedigree table of the father of respondent No. 1 has not been proved in evidence. The evidence of PW3 is nothing but a secondary evidence of a fact which could be proved only by the document itself.

On the basis of the evidence coming on record, the petitioner has not been able to prove that the nomination of respondent No. 1 has wrongly been accepted and/or that respondent No. 1 was not qualified to contest elections from 23-Gherwin (reserved for Scheduled Caste) constituency since she does not belong to Scheduled Caste. The issue is accordingly decided against the petitioner.

Issue No. 5 and 6:

In view of my findings on issue No. 4 above, these issues have become redundant and no findings need be recorded thereunder.

Issues No. 1 to 3:

During the course of hearing, these issues were not pressed before me by the learned counsel for respondents. The same are, accordingly, decided against the respondents.

Relief:

As a result of the findings recorded under issue No. 4 above, the present petition fails and the same is, accordingly, dismissed leaving the parties to bear their own costs.

It is directed that the substance of the decision shall be communicated by the Registrar General to the Election Commission of India, New Delhi and the Speaker of the H. P. Legislative Assembly forthwith. An authenticated copy of the Judgement be also sent to the election Commission of India, New Delhi, as required under Section 103 of the Act.

April 28, 2004.

Seal.

Sd/-
(R. L. KHURANA.)
Judge.

आदेश से

के० अजय कुमार,
सचिव,
भारत निर्वाचन आयोग।

By order,

K. AJAYA KUMAR,
Secretary,
Election Commission of India.